(12)

No. 84-1560

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY,
a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF RIVERSIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF ARGUMENT

The sole constitutional issue raised by petitioner is whether the public has a First Amendment right of access to preliminary hearings in criminal cases.[1] Although peti-

[1]It should be noted that although the petition in this case goes to the issue of public access to preliminary hearings, respondent superior court did not close or refuse the press and public access thereto. The preliminary hearing was held by a magistrate of the *municipal court* who, under *California Penal Code*, Section 868, closed the preliminary hearing at the request of the defendant, without objection by the district attorney, and only after the magistrate found that

tioner recognizes that a preliminary hearing is not a trial, it argues that this Court should establish a federal constitutional right of public access to such a hearing because it is procedurally similar to a trial, most criminal cases are disposed of at the preliminary hearing stage, and there are great societal benefits to be derived from affording the public complete access. Such analysis, however, serves to improperly place the interests of the public in a non-adjudicatory hearing above the fundamental constitutional rights of an accused.

While there may be some procedural similarities between a trial and a preliminary hearing, functionally the two are dissimilar and serve vastly different societal goals. The purpose of trial is to adjudge guilt and innocence. The purpose of preliminary examinations is to protect the liberty of the accused. The right to a preliminary examination, whether public or private, is a right personal to the defendant which guarantees an opportunity to be free from unwarranted criminal prosecutions and the attendant publicity flowing from allegations of criminal conduct.

In addition, California has statutorily balanced the interests of the public in access to preliminary hearings with an accused's Sixth Amendment right to a fair and impartial trial. In California, the examination shall be open and public except when it would deprive an accused of a fair trial. The determination of the procedure of pretrial hearings is a procedural matter traditionally handled by the states.

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closure was necessary to protect the defendant's Sixth Amendment right. The sole act of the respondent *superior court* was its initial refusal to release the sealed transcript of the hearing; however, when the defendant waived his right to a trial by jury, respondent court, *sua sponte*, immediately released the transcript.

Finally, a determination that there is a constitutional right of access on petitioner's theory would injudiciously compel extension of the right to all pretrial proceedings. If, as petitioner suggests, openness fosters confidence in the criminal justice system and is required at that point in the system where the vast majority of criminal complaints are disposed of, the public should necessarily have unlimited access to the office of the district attorney because it is there that the fundamental decision to prosecute or not to prosecute is made. Yet, such access would constitute an unwarranted and disruptive intrusion into the process of criminal justice.

ARGUMENT

I

The California Standard Governing Public Access To Preliminary Hearings Embodied In California Penal Code, Section 868 Comports With The First And Sixth Amendments To The United States Constitution.

The California Legislature initially adopted *California Penal Code,* Section 868 as a rule of criminal procedure designed to protect the rights of criminal defendants. In its opinion in this case (J.A., pp. 4a through 17a), the Supreme Court of California in exploring *California Penal Code,* Section 868 referred to its opinion in *San Jose Mercury-News v. Municipal Court,* 30 Cal. 3d 498 (1982), wherein it articulated the policy factors favoring open preliminary hearings as well as the "several concerns militating against a public preliminary hearing and against requiring defendant to establish that prejudice will occur from a public hearing." (J.A., pp. 13a through 15a). Importantly, the California Supreme Court in *San Jose Mercury-News* pointed out that not only inflammatory

publicity or misleading publicity could threaten the impartiality of the jury pool, but that even factual, relevant reporting could have the same effect. *San Jose Mercury-News,* 30 Cal. 3d at 512. (J.A., p. 14a).

Within two months after the decision in *San Jose Mercury-News,* in apparent recognition of the public interest in openness, the California Legislature amended *California Penal Code,* Section 868 to its present form. In so doing, it created a statutory right of access to preliminary hearings turning upon a standard of necessity for the protection of the criminal defendant's fair trial right. Thereafter, the Supreme Court of California, in the instant case, interpreted that standard in terms of a "reasonable likelihood of substantial prejudice" and concluded that "the primacy of the right to fair trial viewed in the light of the policy consideration in favor of closure set forth above, requires us to conclude that a defendant who has established a reasonable likelihood of substantial prejudice after all of the evidence is considered may not be compelled to risk his fair trial right by an open hearing." (J.A., p. 16a). In creating a statutory right of access to preliminary hearings and prescribing the development of a standard for closure of such proceedings, the California Legislature acted in accord with principles set forth in *Hayes v. Missouri,* 120 U.S. 68, 70 (1886), wherein this Court stated that "to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the Legislature, but is among its highest duties." As the California Supreme Court noted in its opinion in this case, "[t]he legislative history of the amendment to *California Penal Code,* Section 868 shows that the Legislature intended the courts to determine the appropriate standard [for closure of the preliminary hearing]." (J.A., p. 12a).

The statutory access right and judicially determined standard of application relative to *California Penal Code,* Section 868 not only protect the defendant's fair trial right but also recognize and protect the public interest in the openness of such proceedings. Clearly, neither *California Penal Code,* Section 868, nor the California Supreme Court's decision in this case deprive either the press or the public of the right of access to preliminary hearings. Petitioner, however, prefers to see this right characterized as one of constitutional dimension, requiring the application of a different standard for closure.[2] Such characterization is inappropriate.

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[2]Petitioner's reliance on *Waller v. Georgia,* 467 U.S. 39 (1984), and the closure standard cited therein of *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984), is ill founded. Both *Waller* and *Press-Enterprise Co.* are inapposite with regard to the instant case for the following reasons: 1) *Waller* concerns the closure of a pretrial suppression hearing over the defendant's objection, a situation which is the reverse of the one which occurred in the instant case; and 2) a pretrial suppression hearing is very different from a preliminary hearing. As the California Supreme Court noted in *San Jose Mercury-News, supra,* pretrial suppression hearings may be conducted after the defendant has been bound over for trial. *San Jose Mercury-News,* 30 Cal. 3d at 513. The suppression hearing in *Waller* occurred after the jury had been empanelled and thus was virtually part of the trial phase of the criminal prosecution. The *Press-Enterprise Co.* standard as a standard for *trial* closure was fashioned to accommodate a constitutional standard and societal interests in trials and proceedings in close proximity to trials. Such a standard, however, is inappropriate for application to the accusatory phase of a criminal prosecution where preservation of the defendant's fair trial right is clearly paramount. *Gannett Co. v. DePasquale,* 443 U.S. 368 (1979).

II

The Preliminary Hearing Is Functionally Different Than A Trial And Protects Different Societal Goals.

Petitioner accepts, as it must, that a preliminary hearing in a criminal proceeding is not a trial. Rather, it is an accusatory stage whereat a neutral magistrate determines if there is probable cause to bind the accused over for trial. The magistrate's function is to determine whether there is probable cause to believe that a crime has been committed and whether the accused committed it. *Johnson v. Superior Court,* 15 Cal. 3d 248 (1975). Although the examination can perform various functions, its fundamental purpose is to prevent innocent persons from being deprived of liberty founded on baseless allegations. *People v. Elliot,* 54 Cal. 2d 498, 504 (1960).

Although a trial, which determines guilt or innocence, and a preliminary hearing, which simply determines whether a trial should occur, are functionally quite different, petitioner attempts to blur the distinctions between the two by arguing that the preliminary examination has all of the "procedural attributes" of the trial itself. The argument is that if the two proceedings are procedurally the same, then the two proceedings should be treated the same for constitutional purposes. The result, petitioner asserts, is that an open preliminary hearing can thereby provide the same societal benefits derived from open trials. The argument fails.

Certainly there are procedural standards between a trial and a preliminary hearing. At the examination the accused is given a vast array of constitutionally guaranteed safeguards such as the right to counsel and the right to cross-examine witnesses. But the facts that the accused may have similar rights and that the proceeding is conducted formally do not compel the conclusion that a preliminary hearing is akin to a trial.

Historically, the preliminary hearing has served as a tool to protect an accused from the power of the government. Although there may be some disagreement among scholars as to when a preliminary hearing was first known at common law, this Court has found that the prophylactic nature of the examination was well known. "At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest." *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). The reason was to allow for someone independent of police and prosecution to determine probable cause as to whether the accused should be bound over for trial. *Gerstein,* 420 U.S. at 117, citing *Shadwick v. City of Tampa,* 407 U.S. 345 (1972).

In California this concept of a preliminary hearing conducted by a neutral magistrate for the protection of the accused has a long history. In 1851, California adopted the Field Code of Criminal Procedure, with only minor amendments. Geis, *Preliminary Hearings and the Press,* 8 U.C.L.A. L. Rev. 397, 410 (1961). California codified the Field Code in 1872 with the adoption of *California Penal Code,* Section 868, and that Section remained virtually unchanged until 1982 when the State Legislature significantly expanded its provisions to require open and public examinations unless such openness violated an accused's right to a fair and impartial trial.

The preliminary examination, then, functionally serves to protect the rights of the accused. It guarantees that the accused will be afforded a public hearing on the issue of probable cause; it does not and has never been intended to serve as a basis for guaranteeing the public a right of access. This is not surprising because a similar process of

protecting the accused, the grand jury, has traditionally operated in secret.[3]

A trial, on the other hand, functionally, serves to protect the rights of the defendant *and* the public. It is a full-blown court proceeding where the issue of guilt or innocence is tested before a jury and ultimate factual and legal issues are determined beyond a reasonable doubt.

To argue, as petitioner does, that a preliminary hearing "closely resembles" a trial (P.B., p. 13), is to misconstrue the functional purposes and effects of the two proceedings.

III

No Constitutional Right Of Access To Preliminary Hearings Should Be Established On The Ground That Not All Cases Go To Trial.

It is clear that an important component in the effective administration of the criminal justice system is the openness of criminal trials. As this Court has often recognized, the knowledge that the public may attend criminal trials serves to enhance the public perception that there is basic fairness in the criminal justice system. *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, at ____.

Petitioner argues, however, that because the preliminary hearing in California has assumed a "pivotal role in the effective administration of criminal justice, the need

[3]If a constitutional right of access to preliminary hearings is established, the next logical issue will be whether the grand jury similarly should be open to the public. While the two proceedings are in some respects different, the function they perform is the same, and it does not appear that there is any rational basis to differentiate between the two.

for public access to this proceeding intensifies." (P.B., p. 19). The argument is that the cathartic value of open criminal trials would be lost if, after a closed preliminary hearing, a suspect were released. (P.B., p. 15).

Petitioner notes that the preliminary hearing is more pivotal now because in 1985 in Riverside County, California, only one trial took place for every six preliminary hearings. (P.B., p. 18, fn. 9). Petitioner fails to cite any historical statistics to buttress the argument that the preliminary hearing to trial ratio is significantly different now than in the past and, thus, fails to justify the conclusion that the preliminary examination has in fact assumed a more "pivotal role." But even if petitioner provided supplemental statistics, the fact that fewer cases, by percentage, go to trial may be explained by any one of a number of reasons. For example, prosecutors today may choose to file complaints only in those cases where the probability of conviction is high. More importantly, the fundamental flaw in any attempt to use statistical data to support the argument that the preliminary examination is of more importance now, is that the statistics cannot be used to support the establishment of a federal constitutional right of access. The role of the preliminary hearing may be less "pivotal" in other states,[4] and yet petitioner would demand the establishment of a *federal* constitutional right because of a perceived change in the criminal system in *California.* And, if the ratio of trials in California should later swing back to a more

[4]For example, as noted by the California Supreme Court in *Johnson v. Superior Court,* 15 Cal. 3d 248, 262 (1975), "[t]he Alabama preliminary hearing [is] far less 'critical' than its California counterpart, because its sole purpose [is] to determine if there [is] sufficient evidence against the accused to justify bringing the case *before a grand jury.*" (emphasis in original.)

modest difference, should the federal constitutional right of access be disestablished?

Moreover, the theory that a constitutional right of access can be premised on a determination of whether the criminal proceeding is a "pivotal" stage would compel an extension of the right of access to all pretrial proceedings as soon as sufficient data could be collected to prove that the proceeding played a significant role in the criminal justice system. Under petitioner's argument, the public would be able to demand unlimited access to the office of the district attorney because it is there that the fundamental decisions to prosecute or not to prosecute are made. While petitioner may argue that it is only seeking access to court proceedings, the basis of the argument is that openness fosters confidence in the criminal justice system. Yet many more decisions as to whether a person should or should not be charged with a crime are made in secret in the office of the district attorney than are made as the result of closed preliminary hearings.[5]

Finally, there is little probability that under California's mandatory policy of openness that the few closures which may occur will destroy public confidence in the system. The California Legistature has expressly provided that openness is the rule except where an accused's Sixth Amendment right to a fair trial would be abridged. This Court has held that "no right ranks higher than the right of the accused to a fair trial" and that in certain rare circumstances even the public's First Amendment right of access to trials must bow to this Sixth Amendment right. *Press-Enterprise Co. v. Superior Court*, 464

[5]In fact, 47 percent of all felony complaints filed in California in Fiscal Year 1983-84 were disposed of before the preliminary hearing. (See Amicus Curiae Brief in behalf of the State of California, p. 9, fn. 5.)

U.S. 501, ____ (1984). But in pretrial proceedings, especially in the accusatory phase of criminal prosecution, different societal interests are evoked. This Court has recognized that, at such a stage, the defendant's Sixth Amendment right, personal to him, is superior to the public interest in openness of proceedings. *Gannett Co. v. DePasquale*, 443 U.S. 368, 384, 390 (1979) [public may be precluded from attending pretrial suppression hearing]; *United States v. Capra*, 501 F.2d 267, 279 (2d Cir. 1974) [public is precluded from attending pre-arrest law enforcement briefings]. In accordance with this recognition, California has placed only the accused's constitutionally guaranteed right of a fair trial above the public's statutorily recognized interest in access to preliminary examinations.

To open up all phases of the criminal process to a constitutional right of access could ultimately lead to unwarranted and disruptive intrusions into all phases of the accusatory process.

IV

In Closing The Preliminary Hearing And Sealing The Transcript, The Magistrate And the Respondent Court, Respectively, Acted In A Manner Consistent With The Defendant's Sixth Amendment Constitutional Right And The Public Interest.

At the commencement of the preliminary hearing, when the accused moved for an exclusionary order, no objection was made by the prosecutor. The magistrate, relying on *California Penal Code,* Section 868 and *Gannett Co. v. DePasquale, supra*, stated his findings as follows:

> "... I feel that in this particular case and appearances in the Court, there has been national publicity.

As a result of Court appearances, that each Court appearance of the Defendant, media has been present and has been reported in the media and I feel that because of the Preliminary Hearing in which many times the defenses are not presented to show the Defendant's side of the issue, that only one side may get reported in the media." (J.A., p. 22a).

The magistrate then concluded that "the motion should be granted to protect the Defendant's right to a fair trial, and impartial trial." (J.A., p. 23a).

This case involved multiple murder charges carrying a death penalty potential. This Court has held that the "trial court's responsibility to preserve the integrity of the jury and minimize the danger of prejudice is at its peak in death penalty cases." *Beck v. Alabama,* 447 U.S. 625, 637-638 (1980). The findings expressed by the magistrate evidence his concerns regarding the defendant's Sixth Amendment right, and it is submitted, are sufficient to satisfy the "reasonable likelihood of substantial prejudice" standard later articulated by the California Supreme Court in this case. (J.A., p. 16a).

At the conclusion of the preliminary hearing on August 31, 1982, the magistrate permitted Chris Bowman, a reporter for the Press-Enterprise, to enter the courtroom. The defendant then moved that the preliminary hearing transcript be sealed in order to protect his right to a fair trial. This was followed by Mr. Bowman's request that the transcript be released to the public. The prosecutor made no objection to the sealing. The magistrate then concluded:

"I have to go back to the Deganti[6] [sic] case again. I don't remember the exact cite, United States Supreme Court, but it is beyond the statutes of the State of California.

"That case holds that a judge or magistrate, be it a trial or be it a preliminary hearing, has an affirmative duty to insure that a defendant has a fair trial. And even though it may overreach some statute here, I feel that under the Deganti [sic] case which states what my duty is, I have to believe that the only way to protect that right would be to seal the transcript. And I would so order it, based on the citations that Mr. Hewatt has given me and also on the Deganti [sic] case." (J.A., p. 37a).

The magistrate's order sealing the transcript of the preliminary hearing which in the first instance had been closed to protect the defendant's right to a fair trial before an impartial jury, was the only logical step which could be taken at that point in the process, in furtherance of that right. Similarly, in *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982), where this Court dealt with the question of an automatic closure provision in criminal sex offense trials, the Court noted that the Massachusetts rule, while providing for closure during the testimony of minor victims nonetheless permitted the press access to the transcripts of such testimony. This court went on to note: "Thus, § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come

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[6]Although no citation was given for the "Deganti" case referred to by the magistrate, it is obvious he was referring to *Gannett Co. v. DePasquale, supra,* having cited *Gannett* in his remarks at the time he ordered the preliminary hearing closed. (J.A., p. 22a).

forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner. *Globe Newspaper Co.*, 457 U.S. at 610.

On January 21, 1983, a hearing was conducted before the judge in the respondent court at which time the prosecutor moved to have the preliminary hearing transcript unsealed. Also raised at that hearing was the matter of the prosecutor's memorandum of points and authorities in opposition to a *California Penal Code*, Section 995 dismissal motion. The prosecutor, who had presented this memorandum only a few days earlier, had refrained from making it public in order that the question of its disclosure could first be litigated. The reason for this was that in addition to citations of legal authorities and the prosecutor's arguments, the memorandum was prefaced by more than 30 pages of the summarized testimony of prosecution witnesses who had testified at the preliminary hearing.[7]

The judge continued the matter for further hearing and to maintain the status quo, extended the order sealing the preliminary hearing transcript and the prosecutor's memorandum, noting that absent a "very strong showing on the part of the defense" he would unseal the transcript and the memorandum. (S.A.R., pp. A-32 through A-38).

On February 10, 1983, the hearing to determine the motion of the prosecutor, now joined by petitioner, to have the preliminary hearing transcript unsealed was heard before the judge in the respondent court. Except for the reporter Bowman's appearance at the conclusion of the preliminary hearing on August 31, 1982, the first

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[7]This summary is referred to in the respondent court's record of January 21, 1983, as the "statement of fact" (S.A.R., pp. A-1 through A-31; A-32) and the "synopsis of the facts." (J.A., p. 61a).

formal intervention by petitioner in this case appears to have taken place on February 7, 1983, when petitioner filed an application to join the prosecutor in his effort to release the transcript. (P.B., p. 3).

Following argument by counsel for all parties including petitioner, the judge stated:

> ". . . the Court feels compelled under the authority of Gannett to consider several points. First of all, that this is pretrial proceedings, and it's not trial. That whether it is inflammatory type of publicity or merely repetitive factual comments, it has an effect upon the community mind which affects the community pool from which the furors are selected.
>
> "The Court has no objection to the public's right to know. And I think Mr. Mager's initial observations, that as to the evidence he produced it was as factual as it could be . . . It's not extremely inflammatory or exciting type of facts in this.
>
> "But I find it quite easy under Gannett to see that there is a reasonable likelihood that making all or any part of the transcript public might prejudice the defendant's right to a fair and impartial trial. And I will order that the transcript remain sealed.
>
> "I believe all concerned here — This Court certainly is aware that the defendant has interjected a new concept of a defendant's right, at least as far as I know, and yet it's not a new one. We all know that a defendant has a right to be tried in the jurisdiction in which the act occurred. And as an arraigning magistrate I've had to inform defendants of that right many, many times. He's just carrying that to the ultimate now. He has a right to be tried in this jurisdiction. And so far at this point he's saying,

'there being no more publicity from this point than there is, as things now stand, I think I can stay here. And please, judge, don't do something that will impact upon my trial, so that I can't have a fair and impartial trial here, so that I have to go somewhere else. Because if you send me somewhere else, I've been told it's going to be about an 18-month's trial, I've got umpteen witnesses that I'll have to have there, I am in custody because this is a special circumstances case, I do not have a right to bail, and my loved ones would have to come to me, and there's so much publicity in the south here that, pray tell, where would you send me except hundreds of miles away?'

"It is quite easy for me to find that there is a reasonable likelihood that making all or any part of the transcripts public might prejudice the defendant's right to a fair and impartial trial. The decisions, authorities, supplied by defense counsel also give me implicit authority, and thereunder I do exercise inherent authority to prevent the same mischief." (J.A., pp. 60a, 61a).

Thus, the judge ordered the transcript and the prosecutor's memorandum to remain sealed, balancing the public's interest and the defendant's Sixth Amendment right. In so doing, he articulated the problems a change of venue, necessitated by pretrial publicity, probably would occasion in this case.

This Court has indicated that certain curative measures may be invoked to mitigate the effects of pretrial publicity. (See *Sheppard v. Maxwell,* 384 U.S. 333 (1966).) It is reasonable to assume that trial judges are familiar with them. In this case, the judge appears to have carefully considered the alternative of change of venue. Based upon

his statements, he found it inadequate in terms of the defendant's Sixth Amendment right and the severe hardship it would impose over the course of what was then predicted to be an 18-month long trial, where, as the magistrate had indicated at the time he closed the preliminary hearing, there had been "*national* publicity." (J.A., p. 22; emphasis added).

In this case, the danger of pretrial publicity was particularly acute based upon the nature and multiplicity of the crimes alleged, the fact that it had received nationwide publicity and the further fact that virtually anything even remotely connected with the defendant, but not necessarily relevant to the charges against him, seems to have been reported at least in the locality. (P.B., p. 4: "the marriage of the lead defense counsel to his investigator . . . an unusual altercation in the courtroom between two defense counsel . . ."; also see J.A., p. 51a: defense counsel's reference to "articles indicating that Mr. Diaz's wife was briefly held on a traffic warrant."). Thus, the maintenance of the sealing order was, at the time it was made, patently justifiable.

On September 30, 1983, in an uncommon move for a defendant charged with a capital offense, the defendant in this case waived his right to a jury trial. The waiver was conditioned upon the case being tried before the particular judge of the respondent court who had heard all of the pretrial matters in the respondent court which are detailed hereinabove. (S.A.R., p. A-39). What is most significant with respect to this waiver is the conduct of the judge regarding the sealed preliminary hearing transcript and prosecutor's memorandum. After the judge accepted the waiver, there appears in the record a very brief discussion between the parties and the court involving certain miscellaneous matters, and immediately thereaf-

ter the judge, *sue sponte*, raised the issue of the sealed documents, stating:

> "Now, in regard to particularly orders that this Court has made up to this point sealing certain portions of proceedings in this matter, those motions, those orders were made solely upon the premise of a jury trial. It seems those orders should be vacated." (S.A.R., pp. A-39 through A-43; pp. A-44, A-45).

Because of defense objection to the unsealing of the papers at that time, the matter was continued to October 5, 1983, for a hearing to show cause why the sealing order should not be vacated. (S.A.R., pp. A-45 through A-47). On October 5, 1983, that matter was heard. The defendant continued to oppose unsealing the documents, based upon certain contingencies which might occur and which might cause him to retract his jury waiver or to otherwise reinstate a jury trial. The prosecutor indicated his position favoring the maintenance of the status quo, at least for the (then) three-week period until trial would begin. (S.A.R., pp. A-48 through A-51). Before taking the matter under submission and indicating he would issue his ruling on October 14, 1983, the judge commented:

> "Both attorneys' observations in regard to a possibility of something occurring that might at some point produce a change, is correct. We don't have to look through a whole list of horribles. There are many ways in which it happens that cases just don't proceed smoothly on the line outlined. So I'm not discounting that.
>
> "But I have a deep concern that at this point what you're talking about has to be balanced against the fact that there is a jury waiver and that there is no basis for my order other than the fact that it was a jury trial. I didn't make my order on the possibility. I made my order upon the facts that existed, that there was a jury trial.
>
> "Now, there isn't a jury trial. There may be one, but there isn't one now. And I am concerned that there's any jurisdiction, even any discretion left for me." (S.A.R. p. A-51).

As further evidence of his concern for openness and the public interest, on October 14, 1983, the judge ordered the documents unsealed. (S.A.R., p. A-56).

As this Court stated in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966): "... the cure lies in those remedies that will prevent prejudice at its inception." Here, the prevention occurred via the closure of the preliminary hearing, the sealing of its transcript and the maintenance of that sealing until the time that the reason for those actions no longer existed. Importantly, none of those actions impaired the defendant's Sixth Amendment right to a fair trial nor the public's First Amendment right to a public trial.

CONCLUSION

The duties of magistrates and judges in criminal cases involving serious crimes with concomitantly serious potential penalties, cases which engender abundant and widespread publicity, are at best delicate yet crucial affairs. State legislatures should be, and generally are, responsive to regional concerns in enacting rules of criminal procedure which are designed to protect competing rights and interests. This is particularly true in California, as evidenced by the amendment of *California Penal Code*, Section 868 in 1982, to recognize and protect the public interest in openness of preliminary hearings. The

Section, as amended, bears the endorsement of the highest court of the state, as creating a statutory right of access to preliminary hearings.

However, petitioner argues for something more. In so doing, petitioner seeks to place preliminary hearings on the same constitutional plain as criminal trials. This position is inconsistent with the Sixth Amendment rights of persons in the accusatory phase of criminal prosecutions. If accepted by this Court it may place those rights in severe jeopardy insofar as the adjudicatory phase of the prosecution is concerned. Moreover, the implication of a constitutional right of access in the accusatory phase opens the door to disruption of very early stages of the prosecutorial process preceding even the preliminary hearing. It raises the spectre of multiple judicial proceedings to determine competing rights even at, for example, the pre-arrest stage. This, respondent believes, takes the First Amendment beyond what the Framers intended. Traditional constitutional norms, and pragmatic concerns for the integrity of the criminal justice system, dictate affirmance of the holding in this case of the Supreme Court of California.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On January 2, 1986, I served the within Brief of Respondent on the Merits in re: "The Press-Enterprise Company v. Superior Court of the State of California for Riverside County" in the United States Supreme Court, October Term 1985 No. 84-1560 and Supplemental Appendix thereto;

on the Attorneys in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

[See Attached]

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on January 2, 1986, at Los Angeles, California

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